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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 490

AMERICAN LECITHIN COMPANY, INC.,
*Petitioner,*

*against*

PAUL V. McNUTT, as Federal Security Administrator of the United States,
*Respondent.*

## PETITIONER'S REPLY BRIEF

BAER & MARKS,
*Attorneys for Petitioner.*

DONALD MARKS,
MAX P. BENJAMIN,
*of Counsel.*

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y., BARCLAY 7-0349
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## PETITIONER'S REPLY BRIEF

The brief for the Administrator in opposition to the petition for a writ of certiorari requires reply to the following points:

### I.

### Certain assumptions of fact are erroneous.

In his statement of facts, the Administrator summarizes certain findings upon the premise that the facts so found are correct (Brief, pp. 4, 5). One of these findings, No. 53, is used as the basis of a statement that the specific names of emulsifiers used in chocolate products are not familiar to most consumers "but are generally referred to by their collective name 'emulsifier' "; and that, therefore, the label statement "Emulsifier Added" or "With Added Emulsifier" is an informative and appropriate statement of the presence of such ingredients.

Finding No. 53 is not supported by any evidence whatsoever in the Record. This is not an appropriate place to analyze the evidence with respect to the findings, but since the Administrator has made the statement mentioned above, it is necessary to point out that the statement is wholly incorrect and the finding from which it is taken stands without a shred of evidence in the Record to support it. There is not one word of testimony that "these substances are generally referred to by their collective common name 'emulsifiers' ". Neither is there any evidence to justify the conclusion of fact that the label statements above referred to are informative or appropriate, with respect to the presence of the optional ingredients in question.

The statement that the specific names of the emulsifiers used are not familiar to most consumers is predicated upon testimony by two students who made an ex parte and inconclusive survey on the streets in Washington in behalf of one of the intervening parties. An examination of the Record discloses that the survey was limited in scope, the questions were artificial in their significance and no question was asked as to the passer-by's knowledge of the word "emulsifier". Thus, while there is some evidence in the Record that the man on the street was not familiar with the meaning of the name "lecithin", there is no evidence whatsoever that lecithin is ever known by any other name, or that lecithin and any other products are collectively known as "emulsifiers".

That lecithin is the common and usual name of petitioner's material is attested by the Administrator's use of the word in the originally proposed order (Tr. pp. 32-37), and in Sections 14.6(a)(3) and 14.7(a)(3) of the adopted order.

The Administrator states as a fact that lecithin is suitable for use as an emulsifying ingredient in chocolate, basing this statement on Finding No. 50 (Brief, p. 5). The Adminis-

trator repeats this statement as to the use of lecithin on page 8, referring to pages 207 and 208 of the Record.

Here again, while this is no place to argue such factual questions, it should be pointed out that there is no evidence whatsoever in the Record to justify the finding that lecithin acts as an emulsifying ingredient in chocolate products. On the contrary, the Record shows clearly that there cannot be an emulsifying action in any material which does not contain two immiscible liquids, because an emulsifier is an agent which makes immiscible liquids homogenous. In cacao products, the fats constitute the only liquid (except for occasional extraneous moisture) and the function of the lecithin is to reduce viscosity and not to cause emulsification (Tr. pp. 100, 108, 115, 120, 121, 129, 131, 134). There is nothing in the Record to the contrary, and while lecithin is an emulsifier in other applications, it is wholly inappropriate and misleading to refer to it as an emulsifier in connection with its use in chocolate products.

## II.

**The argument as to petitioner's status rests upon untenable premises.**

The Administrator states that "Petitioner is not a member of, nor does it represent, the cacao products industry" (Brief, p. 7). The fact that the Court below made the same observation in its opinion (Record, pp. 207-209) calls for comment on a point that otherwise would be wholly immaterial and irrelevant. The statute does not limit the right to review to those who are members of the industry directly affected by the order of the Administrator; nor do the decisions so construe the statute as to make this the test of "party aggrieved", or "adversely affected".

Furthermore, it should be noted that the term "member" of an industry is loose and undefined. The supplier of an

essential ingriedient may claim membership in the industry with the same force as a processor of the product itself. In any event, the manufacturer, processor or handler of a product which is directly affected by the Administrator's order is within the scope of Section 701 (f)(1), whether he may be said to be a member of the industry or not.

The Administrator assumes to state petitioner's "real complaint" (Brief, p. 8) and the "gist of petitioner's challenge of the order" (Brief, p. 11, note 2) in such a way as to minimize the effect of the order and the issues presented upon this application for a writ of certiorari.

The Administrator argues that the only effect of the order on petitioner is to expose it to greater competition, and conveys the impression that petitioner seeks to preserve some competitive advantage.

This is not so.

Petitioner's complaint is that lecithin is the common and usual name of its product; that the statute requires the Administrator to designate an optional ingredient by its common and usual name for labelling purposes; and that the Administrator has here exceeded his statutory authority.

The result of this abuse of power by the Administrator is to deprive petitioner of the value and good will inherent in the promotion and sale of its product as lecithin. The value of such an element to a business man has been repeatedly recognized by this Court. Any administrative action which places that value in jeopardy constitutes a substantial grievance. Thus petitioner complains that the order fails to require the use of the word lecithin, not because of any competitive disadvantage resulting therefrom, but because the effect is to deprive petitioner of a valuable right in the continued use of the common and usual name of its product, contrary to the mandate of the statute.

As a matter of fact, as is pointed out in petitioner's main brief, the construction of the order referred to by the Administrator is in itself unwarranted on the face of the Record. But even assuming the propriety of such construction,

the effect of the order upon petitioner is not simply to increase competition, but to deprive petitioner of the benefits of years of promotion of its product under its name lecithin.

## III.

### The analysis of the cases fails to note established lines of decision.

The Administrator argues that the cases clearly demonstrate that petitioner is not a party aggrieved under the statute (Brief, pp. 9 to 15). Without detailed analysis, it should be observed that a distinction must be taken between such cases as *Tennessee Power Co., Alabama Power Co., Sprunt & Son,* and *Edward Hines, Trustees* on the one hand, and *Commission* v. *Sanders Brothers Radio Station, Associated Industries* v. *Ickes* and *National Broadcasting Co.* v. *Federal Communications Commission* on the other hand. In the absence of a statutory provision for review of administrative orders by a party aggrieved, it has been said that a complainant must show the invasion of a substantial interest to justify his intervention to vindicate the public interest. However, where a statute such as the Food, Drug and Cosmetics Act contains a "person aggrieved" review provision, the same criteria are not applicable. This distinction was clearly pointed out in *Associated Industries* v. *Ickes,* C. C. A. (2nd) 134 Fed. (2nd) 694 at page 702, et seq. as follows:

> "In those cases, *Federal* v. *Sanders Radio Station,* 209 U. S. 470, 642, 60 S. Ct. 693, 84 L. Ed. 869, 1037 and *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 62 S. Ct. 875, 86 L. Ed. 1229, it has been held that a 'person aggrieved', seeking review under such a statutory provision need not show that he has such a 'standing' as it is ordinarily required either in injunction suits

to restrain actions by officials * * * or in declaratory judgment suits to determine the validity of such action.

* * *

With the majority opinion, illuminated by that dissent, we believe that the usual 'standing to sue' cases can be reconciled with the Sanders and Scripps-Howard cases, as follows:

* * * Congress * * * can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, * * * and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

* * *

The court, in the Sanders and Scripps-Howard cases, as we understand them, construed the 'person aggrieved' review provision as a constitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit * * * to prevent unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded. Although one threatened with financial loss through increased competition resulting from unlawful action of an official cannot, solely on that account, make the proper showing to maintain a suit against the official, absent such a statute, yet the 'person aggrieved' statute gives the needed authority to do so to one who comes within that description. True, in the Sanders and Scripps-Howard cases, the review provisions of the statute referred not only, as here, to a 'person aggrieved' but also to a 'person adversely affected' by the administrative order; we think, however, that the omission of the latter clause in Sec. 6 (b) of the Act before us makes no significant difference. * * *

> Of course, not every person is a 'person aggrieved'. But the Supreme Court has explicitly told us that one threatened with financial loss through increased competition from a Commission's order is 'aggrieved' and entitled as such to a review notwithstanding that the very statute pursuant to which he obtains review is designed to keep competition alive and confers upon him no property right which gives him any kind of immunity from competition. It would seem clear, then, that a consumer threatened with financial loss by a Commission's order, which fixes prices and prevents competition among those from whom the consumer purchases, is also a 'person aggrieved'."
>
> * * *

The Administrator places great emphasis upon the decision of the Circuit Court of Appeals for the Second Circuit in *U. S. Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 Fed. (2nd) 116 (Brief, pp. 12-15). An excerpt from the opinion in that case is quoted to support the proposition that the order in this case does not have such direct adverse effect upon petitioner as to establish its standing to sue.

The Administrator argues on the basis of the *Cane Sugar* decision that exposure to increased competition is not a sufficient direct and adverse effect under the statute. It should be noted, however, that this line of distinction is not applicable where the adverse effect consists of the deprivation of good will and advertising value connected with the common and usual name of a product. In any event, even if the sole question here were the degree of adverse effect of the order upon petitioner, that effect is sufficiently direct and substantial to qualify petitioner as a party aggrieved. In this connection, the following statement by the Circuit Court of Appeals in the *Cane Sugar* case (omitted in the Administrator's Brief) should be noted:

> "As we said in the Associated Industries case, a consumer threatened with the prospect of having to

> pay higher prices for coal because of an order which fixes prices and prevents competition among those from whom the consumer purchases is a person 'aggrieved'. The effect in that instance was direct as well as certainly adverse. So, too, increased competition may be enough, though the policy behind the statute is to maintain competitive practices that are in the public interest, to show that a person has been 'adversely affected' by an administrative order. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 642, 60 S. Ct. 693, 84 L. Ed. 869, 1037.

The Administrator seeks to bolster the dismissal of the petition below by painting an ominous picture of the chaos that would result from permitting persons "as remotely affected as petitioner" to challenge the Administrator's order (Brief, p. 16). The Administrator also points to a variety of trade names of lecithin and other ingredients as examples of the ramifications of petitioner's complaint (Brief, p. 17). It may be observed that there is no justification for either cry of "wolf".

As to the first point the Record does not show any "scramble" to bring complaints against the Administrator before the Courts. There has been no noticeable smothering of the Administrator "with a welter of conflicting claims" (Brief, p. 18). If petitioner's case is just and its complaint against the Administrator is legally sound, statutory limitations upon the Administrator's authority should be enforced regardless of the possibility of other complaints. The remedy, if the Administrator's forebodings prove accurate, is with Congress.

As to the second point the suggestion that manufacturers of lecithin will seek permission to have their trade names approved for label purposes is specious. Petitioner seeks only approval of the name "lecithin" which is the common and usual name of the material, and not a fanciful trade name. The existence of a variety of trade names has no bearing

upon this case. Petitioner seeks only its rights under the statute and does not argue for a commercial advantage, as the Administrator suggests.

## CONCLUSION

In view of the error of the Circuit Court of Appeals in dismissing the petition, this application for a writ of certiorari should be granted.

BAER & MARKS,
by DONALD MARKS,
*Attorneys for Petitioner.*

DONALD MARKS,
MAX P. BENJAMIN,
*of Counsel.*